

# Colorado Water Law Basics and Challenges and Changes for Agriculture

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## Prior Appropriation

- First in time, first in right - do not need to be a riparian landowner to have a water right.
- In times of shortage, burden is NOT shared equally.
- Western U.S. - varies by state.

# Colorado Constitution

## Article XVI. Mining and Irrigation

**§ 5. Water of streams public property.** The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, *subject to appropriation as hereinafter provided.*

**§ 6. Diverting unappropriated water . . .** The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied . . .

**§ 7. Right-of-way for ditches, flumes.** All persons and corporations shall have the right-of-way across public, private and corporate lands for the construction of ditches, canals and flumes for the purpose of conveying water for domestic purposes, for irrigation of agricultural lands, and for mining and manufacturing purposes and for drainage, upon payment of just compensation.

# Tributary v. Nontributary

- Colorado's constitutional right of prior appropriation applies only to all water in or tributary to natural surface streams.
- All ground water in Colorado is presumed to be tributary until proven otherwise.
- The Colorado General Assembly has plenary authority over the administration and use of nontributary ground water.
- Nontributary ground water is generally allocated in accordance with the ownership of the overlying land with some exceptions.
- Nontributary ground water is not subject to the priority system, but its use requires a permit from the State Engineer.

# Water Rights

A water right is created by diverting water and applying the water to beneficial use.

Diversion: removing water from its natural course or location or controlling water in its natural course by means of a control structure such as a ditch, pipeline, reservoir, well . . .

Beneficial use: the use of the amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish *without waste* the purpose for which the water was appropriated such as irrigation, domestic, industrial, commercial, piscatorial, wildlife, fire protection . . .

# Water Rights

## Exceptions:

- Recreational In-Channel Diversion (RICD) water right can only be held by a county, municipality, city and county, water district or other water related districts defined by statute.

RICD = The minimum amount of stream flow controlled between two control structures for a reasonable recreational experience.

- Instream Flow (ISF) water right can only be held by the Colorado Water Conservation Board (CWCB).

ISF = The appropriation of such waters of natural streams and lakes as the CWCB determines may be required to preserve the natural environment to a reasonable degree.

# Types of Water Rights

**Surface:** A direct flow right where water is diverted and put to use typically through a ditch or pipeline.

- Water right is limited to a certain flow rate measured by cubic feet per second (c.f.s.) or gallons per minute (g.p.m.) Now right may also be limited to a maximum annual volume measured in acre feet (a.f.).

**Storage:** A right to impound, possess and control water by means of a dam. Water is stored in a reservoir or pond for later use.

- Water right is limited to a certain annual volume measured in acre feet. General rule is one fill per water year, unless decree provides otherwise.

**Underground:** A right where water is diverted from the unconsolidated alluvial aquifer of sand, gravel, and other sedimentary materials beneath the surface through a well. Includes sand or gravel pits or ponds that intercept groundwater. Permit from State Engineer is needed.

- Water right is limited to a certain fill rate and annual volume.

# Types of Water Rights

**Nonconsumptive versus consumptive:** A water right is nonconsumptive when all of the water diverted returns to the stream after use. This includes ISFs, RICDs and hydropower rights. Most water rights are consumptive as some percentage of the water is “consumed” and physically lost to the stream through the use.

- Return flow is that water not consumed from the use which returns to the stream for diversion by junior water rights.

**Transbasin/Transmountain:** A transbasin water right diverts water from one basin into another. A transmountain diversion diverts water across the Continental Divide.

- These diversions are 100% consumptive as to the basin of origin because there are no return flows.
- By law, junior water rights in the receiving basin are not entitled to rely upon the return flows and the diverter may reuse the water over and over.



# Perfection of a Water Right

The creation of a water right is dependent only upon diverting the water and putting it to beneficial use, but the real value in a water right is dependent on its “priority” and requires the perfection of a water right through adjudication in water court.

**Priority:** The seniority by date as of which a water right is entitled to use water and the relative seniority of a water right in relation to other water rights.

- “First in Time, First in Right”
- Priority depends on two things - the year you file to adjudicate your right and your appropriation date.
- Generally, water rights based on applications filed in one year are junior to decreed water rights based on applications filed in previous years. Within a given year, priority is based upon appropriation dates.
- The State Engineer administers water rights based upon priority. When a senior water right places a “call” on a river or stream because it is not getting the water it is entitled to, diversions under junior water rights are shut off, starting with the most junior, until the senior right is satisfied.

# Adjudicated Water Rights

**Absolute:** The appropriation has been completed. The water has been diverted and put to beneficial use.

- An absolute water right is “abandoned” or terminated, in whole or in part, as a result of the intent to discontinue permanently the use of the water. There is a statutorily created rebuttable presumption of abandonment if a water right is not used for ten years or more.

**Conditional:** The appropriation has been started, but not completed. Obtaining a conditional water right holds a place in the “priority” line while a planned water project is completed.

- To maintain a conditional water right and place in line, you must make periodic diligence applications to the water court and prove you are developing the water right with reasonable diligence.
- A conditional water right is considered abandoned if you fail to file a timely diligence application or if you fail to prove reasonable diligence.

# Augmentation Plans and Substitute Water Supply Plans

- In overappropriated stream systems, a court approved augmentation plan is needed in order to get new well permit for withdrawal of tributary groundwater, or to obtain a decree for a new surface diversion.
  - Augmentation plans allow for out-of-priority diversions by providing replacement water for the water consumed by the junior diversion.
  - Replacement water must replace the water in terms of time, place, quantity and quality.
- State Engineer has authority to approve a substitute water supply plan which allows for temporary out-of-priority diversions for defined periods and/or while an augmentation plan application is pending in water court.

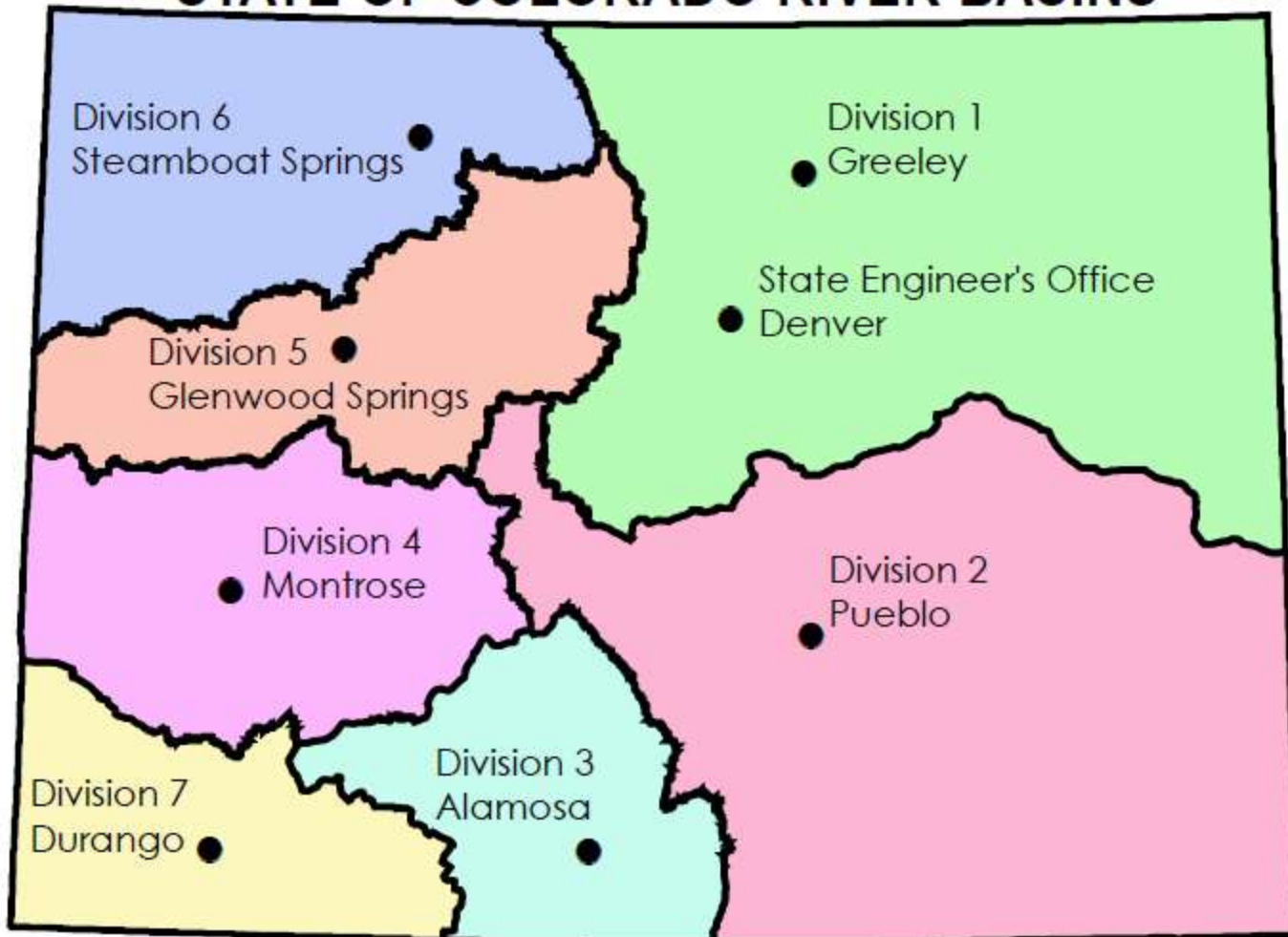
# Adjudications

- Before 1969
  - Periodic adjudications in district courts
  - Initiated by a petition in a water district, notice to all claimants to join case
  - Adjudication dealt with multiple claims and single decree issued
- After 1969
  - On-going individual adjudications in water courts
  - Initiated by an application
  - Each adjudication deals only with the claims brought in the application

# Water Right Determination and Administration Act of 1969

- Established seven water divisions in accordance with the State's seven major watersheds
- Provided water right priorities to be tabulated within each division
- Assigned one district court within each division to be the sole water court with exclusive jurisdiction over water matters within the division
- Each water court assigns a single district court judge to be the Water Judge for that division
- Each division has a Division Engineer who is responsible for administration of water within the division and reports to the State Engineer

# STATE OF COLORADO RIVER BASINS



# Adjudication Process

- Need intent to make beneficial use of water and demonstrate intent
- File water court application and provide information required by Colorado Supreme Court form application
- Water Judge refers the Application to the Water Referee
- Publish notice of application in local newspapers and through water court monthly water resume
- Two month period in which anyone can file a statement of opposition to the Application
- Field investigation by Water Commissioner
- Division Engineer reviews the Application, consults with the Water Referee and issues a report with recommendations and/or concerns

# Adjudication Process

## No Statement of Opposition

- Applicant addresses concerns raised in Division Engineer's report.
- If resolved to everyone's satisfaction, Water Referee issues a "Ruling of Referee".
  - 20 day protest period must run before Water Judge confirms the Ruling of Referee and makes it a final Decree.
  - If anyone files a Protest, Application goes to Water Judge for trial (unless parties reach an agreement acceptable to Water Judge) and final Decree.
- If Applicant cannot satisfy concerns or cannot persuade Water Referee the ruling desired by Applicant is in accordance with the law, Applicant can request its Application be re-referred to the Water Judge for a trial and final Decree.



# Adjudication Process

## Statement of Opposition Filed

- If the parties agree, the case remains with the Water Referee who manages the case while the parties try to reach a negotiated resolution which addresses the opposers' concerns and the Division Engineer's concerns, if any.
  - If successful, Water Referee will enter Ruling of Referee that has been stipulated to by all the parties.
  - If not, the Water Referee will re-refer it to the Water Judge for trial.
- Any party can decide to have the matter re-referred to the Water Judge for trial.
- Many applications are not opposed and most are resolved in front of the Water Referee.

# “Can and Will” Doctrine

- No claim for a conditional water right may be recognized
  - unless the applicant proves the water can and will be diverted and beneficially used; and
  - that the project can and will be completed with diligence and within a reasonable time.
- Standard must be met in original application and subsequent diligence applications.

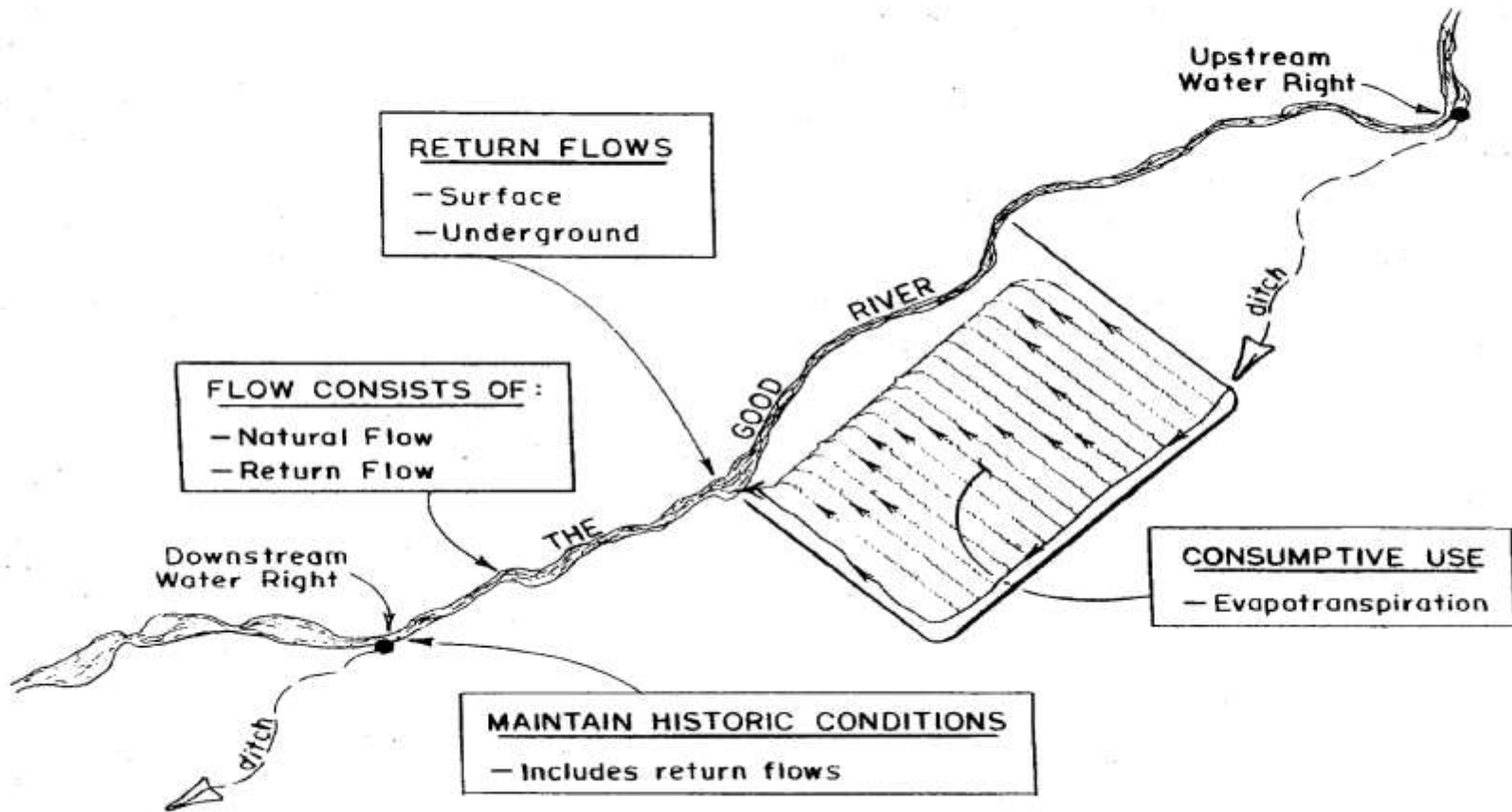
# Anti- Speculation Doctrine

- No appropriation is held to occur, absolute or conditional, if the proposed appropriation is based upon the speculative sale or transfer of the rights to persons not parties to the proposed appropriation.
  - Applicant needs to have a legally vested interest, or reasonable expectation of procuring such interest, in the lands or facilities to be served by the appropriation (except where the applicant is a governmental agency).
  - Applicant needs to have a specific plan and intent to use a specific amount of water for specific beneficial uses.

# Changing Water Rights

- Absolute and conditional water rights can be changed for new uses and new places of use and still maintain senior priority.
  - Needs to be done by obtaining Water Court decree.
  - Amount that can be changed is not necessarily the decreed amount, but is limited to the amount historically consumptively used in accordance with the original decree.
    - Conditional water rights have no historical use and changes are limited to the “contemplated draft” on the stream.
  - Need to maintain existing stream conditions by taking into account the timing of diversions and timing of return flows.
  - Need to show change will not injuriously affect other water rights.

# Changing Water Rights





## Grand Valley Irrigation Water Rights

No. 102. Waiting for water. Residence of B. B. Freeman,  
in Sec. 16, T. 2 N., R. 3 W., Ute M. Mr. Freeman  
and family have been waiting nearly six years,  
having moved into this cabin in 1908. H.T.C.  
Aug. 21, 1913.

# Irrigation Water Providers

Establish the district you reside in and click on the corresponding link to visit that providers page.

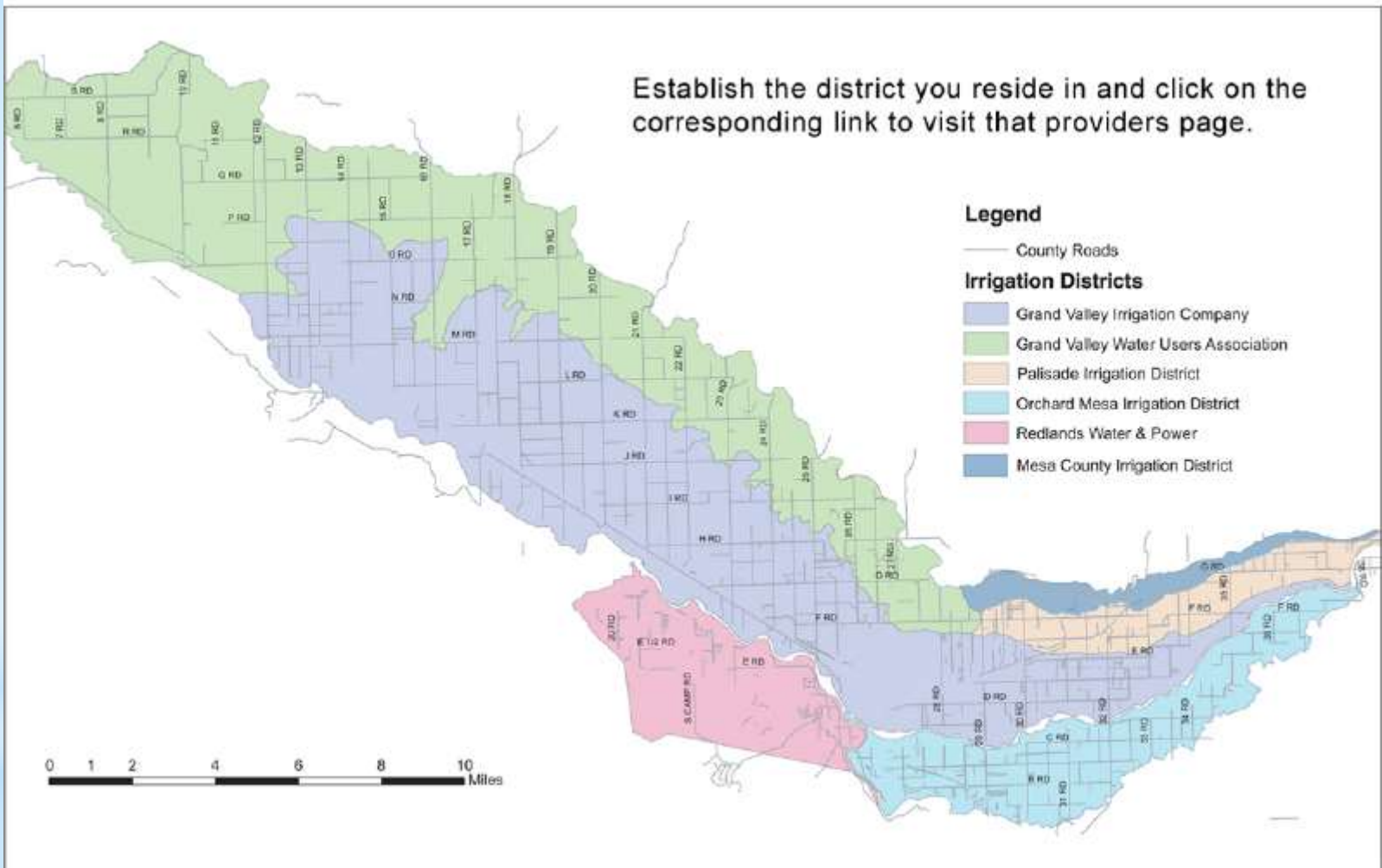
## Legend

— County Roads

## Irrigation Districts

- Grand Valley Irrigation Company
- Grand Valley Water Users Association
- Palisade Irrigation District
- Orchard Mesa Irrigation District
- Redlands Water & Power
- Mesa County Irrigation District

0 1 2 4 6 8 10 Miles



# Grand Valley Irrigation Rights

## Cameo Call

<u>Entity</u>	<u>Amount</u>	<u>Approp. Date</u>	<u>Adjud. Date</u>
Grand Valley Irr. Co.	520.81	1882	1912
Palisade Irr. District	80	1889	1912
Orchard Mesa Irr. Dist.	10.2	1900	1912
Mesa County Irr. Dist.	40	1903	1912
Orchard Mesa Irr. Dist.	450	1907	1912
GVWUA/USA	730	1908	1912
GVWUA/USA	400/800	1908	1941
Grand Valley Irr. Co.	119.47	1914	1941
Palisade Irr. District	23.5	1918	1941

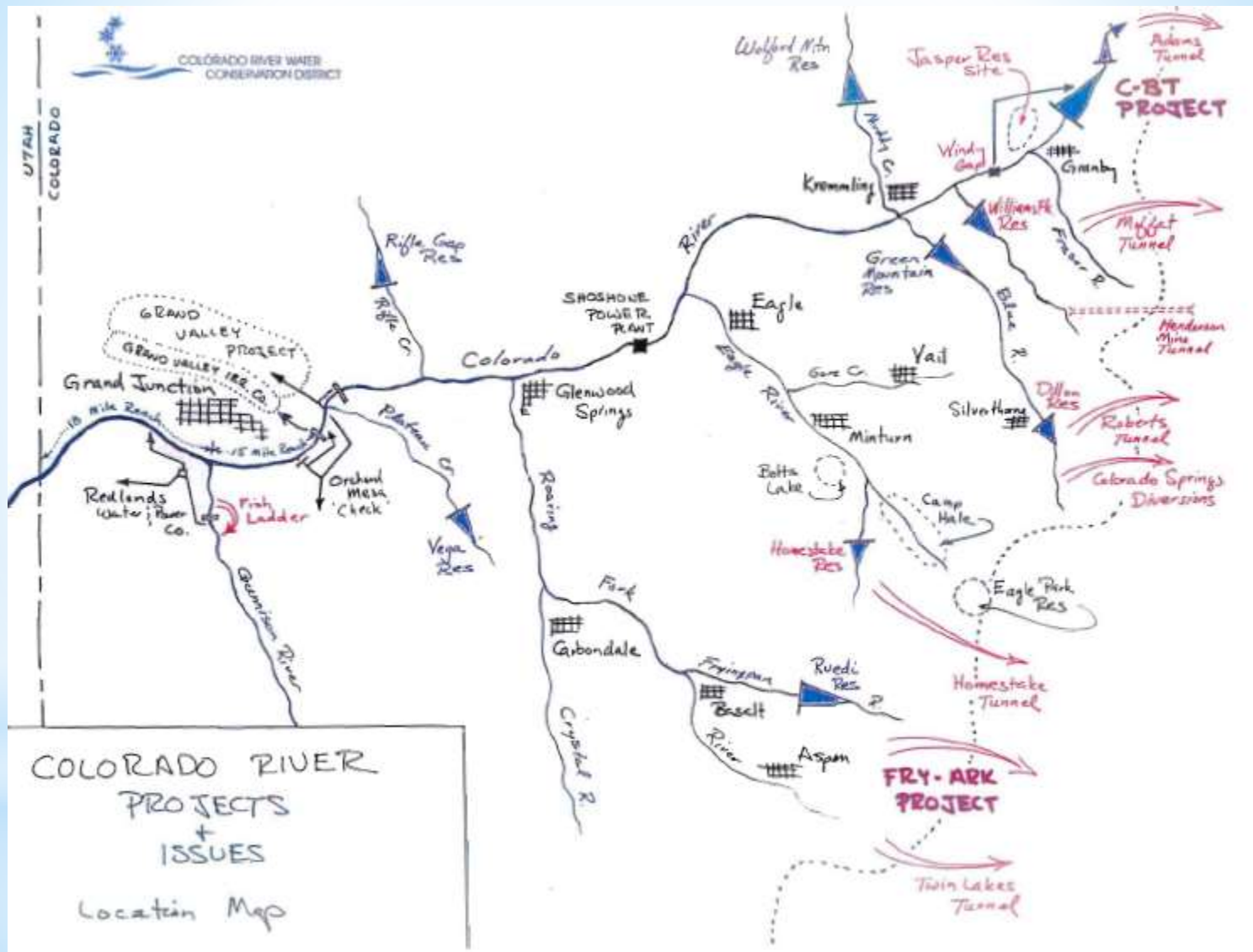
All are decreed for irrigation use except for the 400/800 c.f.s. right, which is decreed for power purposes

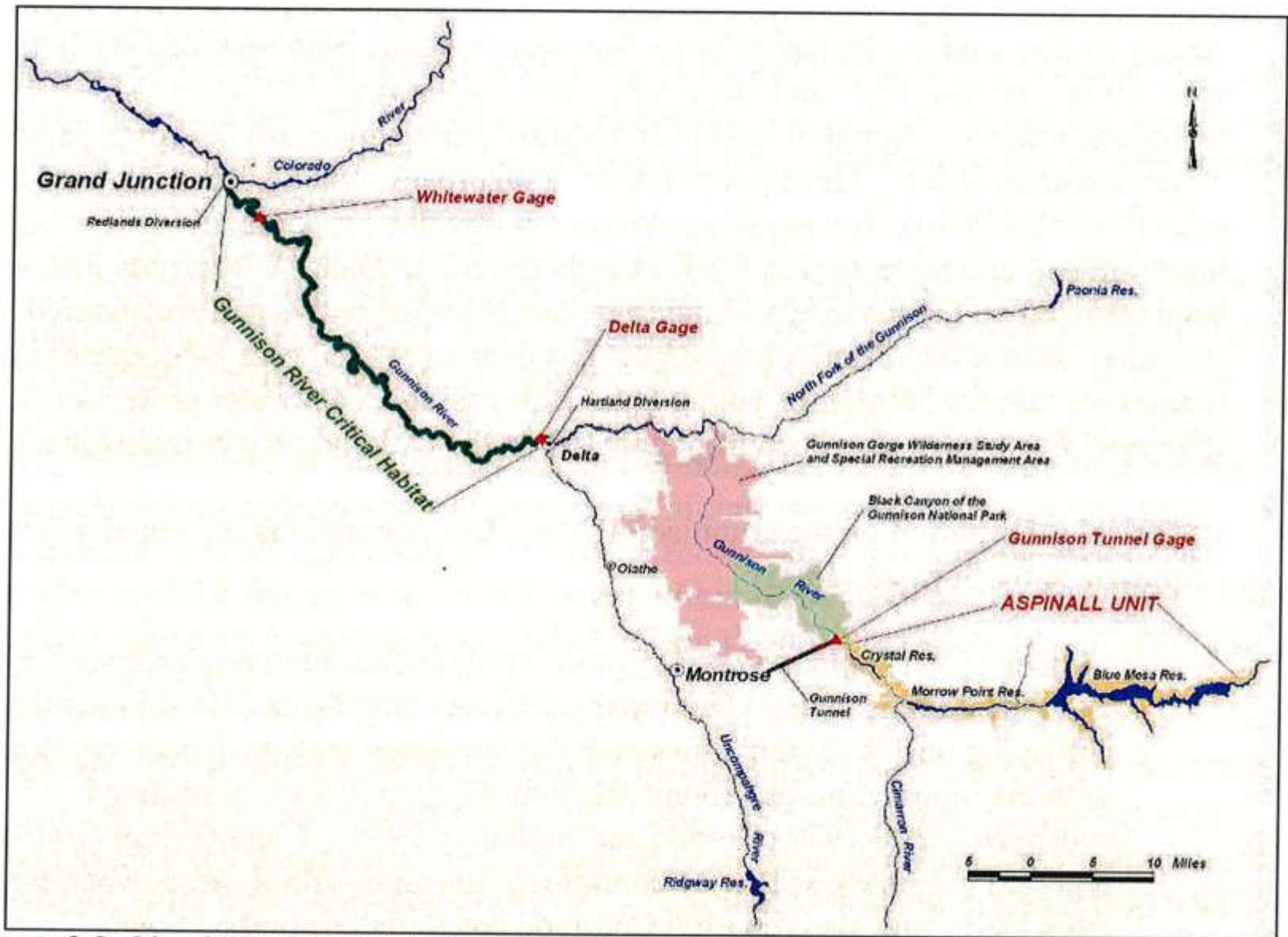
## Redlands Call

<u>Entity</u>	<u>Amount</u>	<u>Approp. Date</u>	<u>Adjud. Date</u>
Redlands Water & Power Co.	670	1905	1912
	80	1941	1959
	100	1994	1994

Decreed for irrigation and power







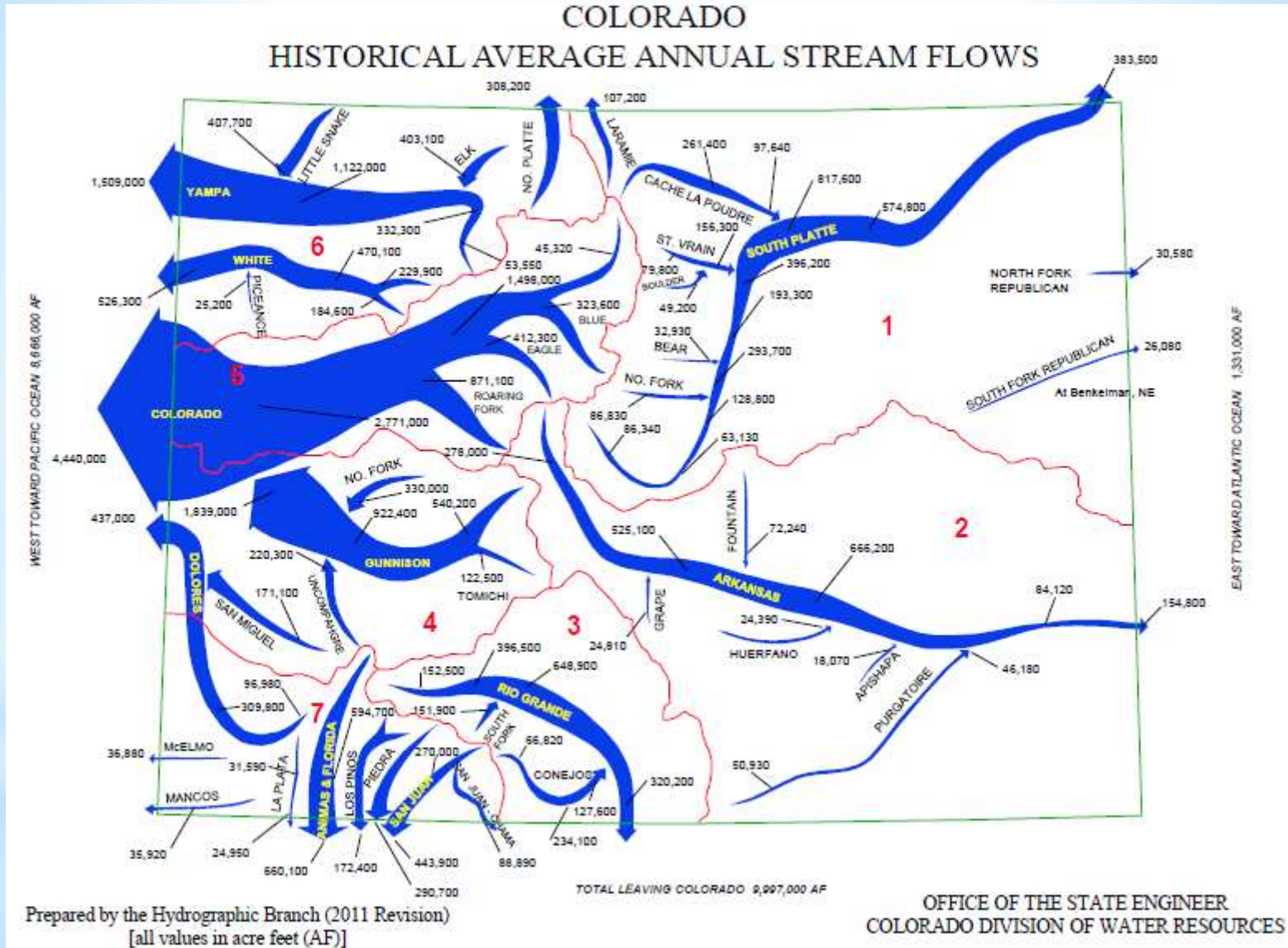
**Figure 3.3- 30—Critical Habitat, Gunnison River.**

# Challenges and Changes for Agriculture



80% Precipitation

80% Population

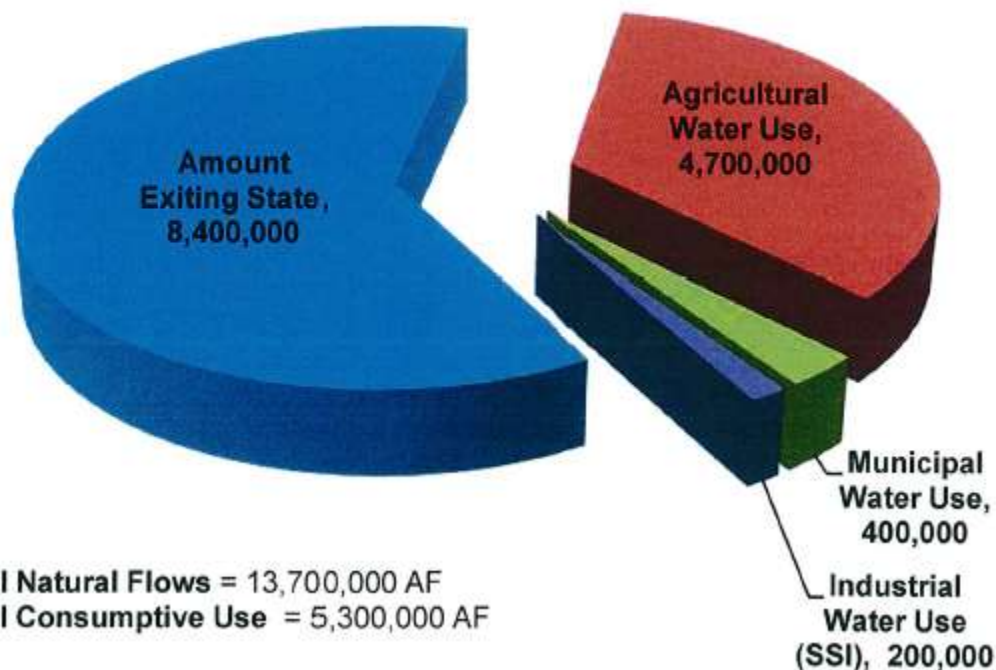


Pop. 562,000 (2008)  
Irr. Acres 918,000 (2005)

SWSI 2010

Pop. 4,490,000 (2008)  
Irr. Acres 2,548,000 (2005)

Figure 5-1: Statewide consumptive water use<sup>1</sup>



## COLORADO AGRICULTURE

- DIVERTS approximately 34% of the water originating in Colorado
- CONSUMES approximately 89% of the water consumed in Colorado



# Colorado Basin Implementation Plan

COLLABORATING ON COLORADO'S WATER PLAN

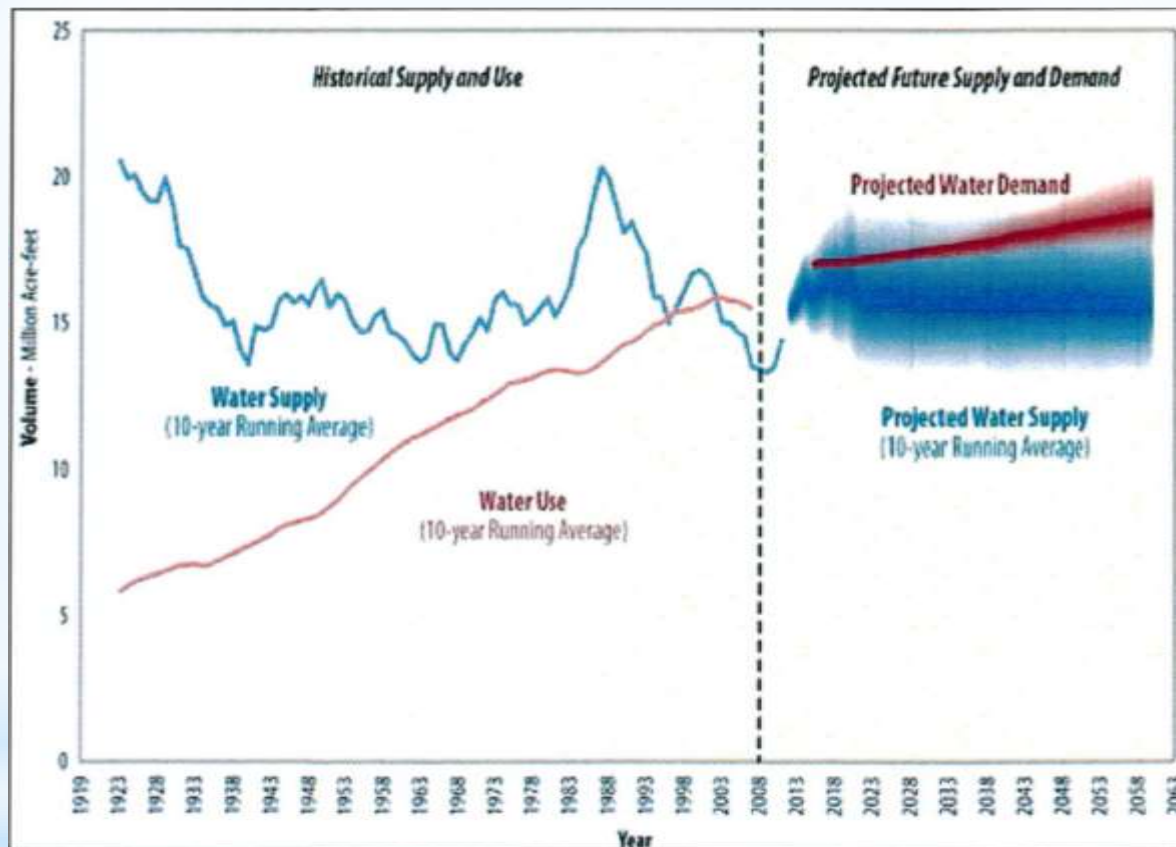


Figure 1. Historical and Future Projected Colorado River Basin Use and Demand. (BOR, 2012)



## Western Slope Ag Water

Harvesting the Water: A Western Colorado Perspective - Mark Harris  
Colorado River District  
2014 Annual Water Seminar, Sept. 19, 2014, Grand Junction, CO  
"Growing the River: Is It All About Ag?"



## “Buy & Dry” Predictions

Potential loss of irrigated land:

- South Platte River Basin could lose up to 35%
- Colorado River Basin could lose 29%
- Arkansas River Basin could lose 17%

## PRESSURES ON AGRICULTURAL WATER USE

- Predicted increase in temperatures means:
  - + more evaporation losses
  - + more evapotranspiration by plants
  - + longer growing season
  - = more consumptive use of water
- Decreasing snowpack = reduction in supply
- Growing population = increased demand for senior water rights
  - + increased demand for food production

## Alternative Transfer Methods



## ALTERNATIVE TRANSFER METHODS (“ATMs”)

GOAL: Provide water for growing municipal needs while minimizing “buy & dry” in a way that respects property rights, recognizes the importance of agriculture and supports sustainable agriculture in Colorado.

## CONCERNS/BARRIERS/IMPEDIMENTS/OBSTACLES:

- Legal – Colorado water law
- Financial – costs to implement and potential lost income and market share for agricultural producer
- Technical – need more research and data to determine outcomes of specific approaches (examples: crop yields, water savings, long term effects on land)
  - producers may lack equipment or expertise for new farming method or crop

## LEGISLATIVE EFFORTS

C.R.S. § 37-92-103(2), Abandonment of a Water Right

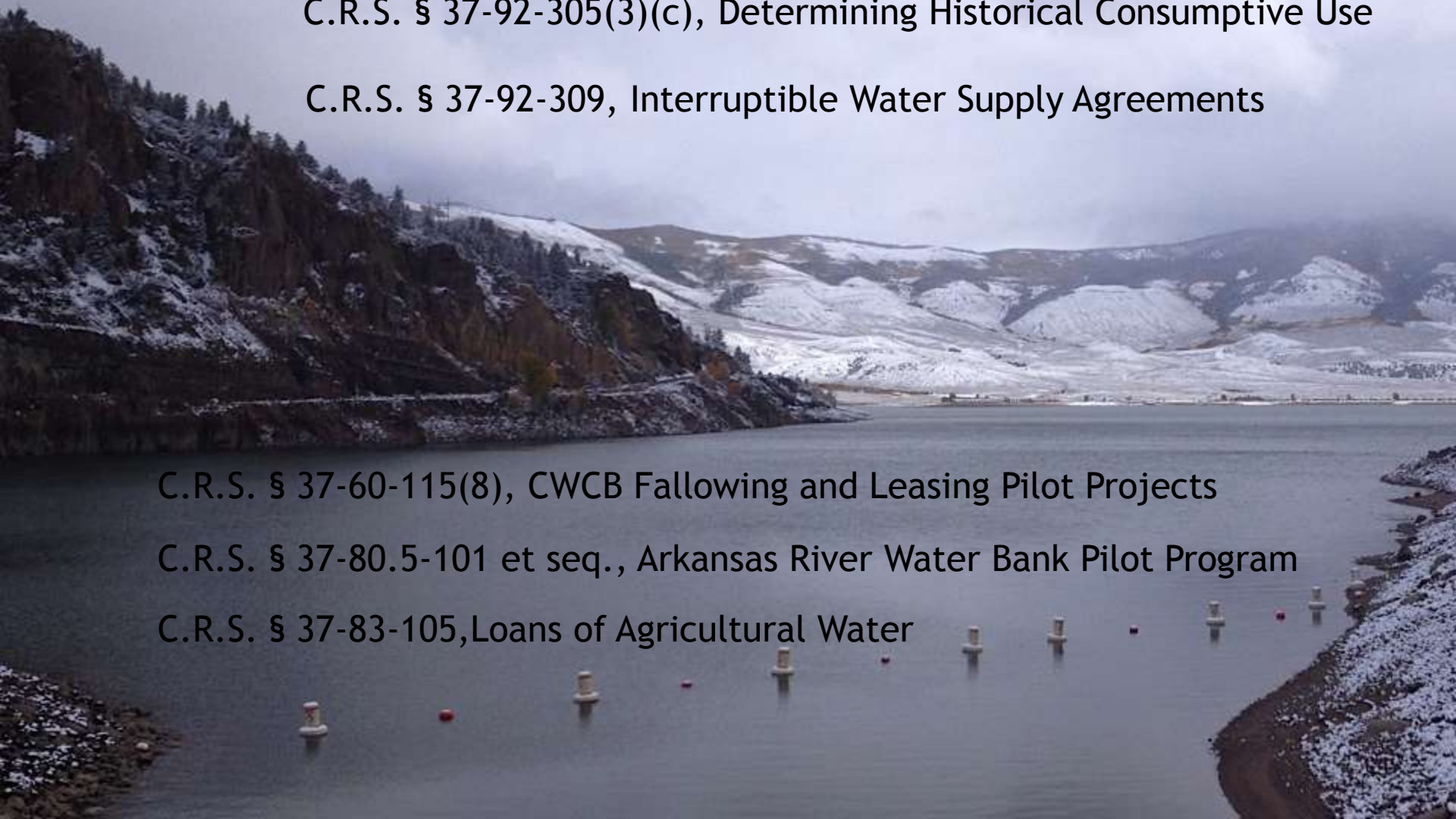
C.R.S. § 37-92-305(3)(c), Determining Historical Consumptive Use

C.R.S. § 37-92-309, Interruptible Water Supply Agreements

C.R.S. § 37-60-115(8), CWCB Fallowing and Leasing Pilot Projects

C.R.S. § 37-80.5-101 et seq., Arkansas River Water Bank Pilot Program

C.R.S. § 37-83-105, Loans of Agricultural Water



**C.R.S. § 37-92-103(2)**

- (2) "Abandonment of a water right" means the termination of a water right in whole or in part as a result of the intent of the owner thereof to discontinue permanently the use of all or part of the water available thereunder. **Any period of nonuse of any portion of a water right shall be tolled, and no intent to discontinue permanent use shall be found for purposes of determining an abandonment of a water right for the duration that:**
- (a) The land on which the water right has been historically applied is enrolled under a **federal land conservation program**; or
  - (b) The **nonuse of a water right by its owner is a result of participation in:**
    - (I) A **water conservation program** approved by a state agency, a water conservation district, or a water conservancy district;
    - (II) A **water conservation program** established through formal written action or ordinance by a municipality or its municipal water supplier;
    - (III) An **approved land following program** as provided by law in order to conserve water;
    - (IV) A **water banking program** as provided by law;
    - (V) A loan of water to the Colorado water conservation board for instream flow use under section 37-83-105 (2); or
    - (VI) Any contract or agreement with the Colorado water conservation board that allows the board to use all or a part of a water right to preserve or improve the natural environment to a reasonable degree under section 37-92-102 (3).

**C.R.S. § 37-92-305(3)(c)**

(c) In determining the amount of **historical consumptive use** for a water right in division 4, 5, or 6, the **water judge shall not consider any decrease in use resulting from the following:**(I)

The land on which the water from the water right has been historically applied is enrolled under a federal land conservation program; or

(II) The **nonuse or decrease in use** of the water from the water right by its owner for a **maximum of five years in any consecutive ten-year period** as a result of participation in:(A)

A **water conservation program** approved by a state agency, water conservation district, water district, water authority, or water conservancy district for lands that are within the entity's jurisdictional boundaries;

(B) A **water conservation program** established through formal written action or ordinance by a water district, water authority, or municipality or its municipal water supplier for lands that are within the entity's jurisdictional boundaries;

(C) An **approved land fallowing program** as provided by law in order to conserve water or to provide water for compact compliance; or

(D) A **water banking program** as provided by law.



**C.R.S. § 37-92-309. Interruptible water supply agreements**

(1) The general assembly hereby finds, determines, and declares that there are certain circumstances under which **administrative approval of the use of interruptible water supply agreements can maximize the beneficial use of Colorado water resources without the need for an adjudication** and without injury to vested water rights or decreed conditional water rights. **This section is intended to enable water users to transfer the historical consumptive use of an absolute water right for application to another type or place of use on a temporary basis without permanently changing the water right.**

(2) For purposes of this section:(a) "Interruptible water supply agreement" means an option agreement between two or more water right owners whereby:(I) **The owner of the loaned water right agrees that, during the term of the agreement, it will stop its use of the loaned water right for a specified length of time if the option is exercised** by the borrowing water right owner in accordance with the agreement; and

(II) **The borrowing water right owner may divert the loaned water right for such owner's purposes**, subject to the priority system and subject to temporary approval by the state engineer in accordance with this section.

(b) "Loaned water right" means any identified water right, or identified portion of a water right, specifically described in the interruptible water supply agreement.

• • •

c) **An interruptible water supply agreement approved pursuant to this section cannot be exercised for more than three years in a ten-year period, for which only a single approval is required.** The ten-year period begins with the granting of the approval. A water right subject to the agreement under this section cannot use section 37-92-308 (5). The state engineer shall not approve an interruptible water supply agreement pursuant to this subsection (3) for another ten-year period, except:(I) If the agreement has not been exercised during the term of the agreement, an applicant may reapply one time by repeating the application process pursuant to this subsection (3); and

• • •

**C.R.S. § 37-60-115(8) - CWCB Following and Leasing Pilot Projects**

(8) Following and leasing pilot projects. (a) After a period of notice and comment, the board may, in consultation with the state engineer and upon consideration of any comments submitted, select the sponsors of up to ten pilot projects pursuant to the approval process set forth in paragraph (f) of this subsection (8). The board shall not itself sponsor a pilot project, but the board may provide financial, technical, or other assistance to a pilot project pursuant to the board's other activities and programs. No more than three pilot projects may be located in any one of the major river basins, namely: The South Platte river basin; the Arkansas river basin; the Rio Grande river basin; and the Colorado river basin. Each project may last up to ten years in duration **and must demonstrate the practice of:**(I) **Following agricultural irrigation land;** and

(II) **Leasing the associated water rights for temporary municipal use.**(b) The purpose of the pilot program is to:(I) In following irrigated agricultural land for leasing water for temporary municipal use, **demonstrate cooperation** among different types of water users, including cooperation among shareholders, ditch companies, water user associations, irrigation districts, water conservancy districts, water conservation districts, and municipalities;

(II) **Evaluate the feasibility of delivering leased water to the temporary municipal users;**

(III) Provide **sufficient data** from which the board, in consultation with the state engineer, can evaluate the efficacy of using a streamlined approach, such as an accounting and administrative tool, for determining:(A) Historical consumptive use;

(B) Return flows;

(C) The potential for material injury to other water rights; and

(D) Conditions to prevent material injury; and

(IV) **Demonstrate how to operate, administer, and account for the practice of following irrigated agricultural land for leasing water for temporary municipal use without causing material injury to other vested water rights, decreed conditional water rights, or contract rights to water.**

**Arkansas River Water Bank Pilot Program, C.R.S. § 37-80.5-101 et seq.**

**C.R.S. § 37-80.5-102. Legislative declaration.**

The general assembly hereby finds, determines, and declares that the purpose of this article is to authorize the creation of water banks within each water division to be operated under strict parameters established by rules approved by the water court. Accordingly, this article provides for the promulgation of rules concerning water banks and requires the water court to approve the rules and the state engineer to report to the general assembly regarding the operation of the banks. The water bank program created by this article is intended to simplify and improve the approval of water leases, loans, and exchanges, including interruptible supply agreements, of stored water within each river basin, reduce the costs associated with such transactions, and increase the availability of water-related information. **It is also the purpose of the water banks to assist farmers and ranchers by developing a mechanism to realize the value of their water rights assets without forcing the permanent severance of those water rights from the land. The general assembly affirms the state constitution's recognition of water rights as a private usufructuary property right, and this article is not intended to restrict the ability of the holder of a water right to sell, lease, or exchange that water right in any other manner that is currently permitted under Colorado law.** Further, this article is not intended to be implemented in any way that would cause material injury to the owner of or persons entitled to use water under a vested water right or a decreed conditional water right, nor to repeal or in any manner amend the existing water rights adjudication system except as may be specifically set forth in this article.

**C.R.S. § 37-83-105. Loans of agricultural water**

(1) Subject to the limitations of this subsection (1) and pursuant to the procedures set forth in paragraph (b) of subsection (2) of this section, the owner of a water right decreed and used solely for agricultural irrigation purposes may loan all or a portion of the water right to another owner of a decreed water right on the same stream system and that is used solely for agricultural irrigation purposes for no more than one hundred eighty days during any one calendar year if the division engineer approves such loan in advance and the loan does not cause injury to other decreed water rights.

(2) (a) A water right owner may loan water to the Colorado water conservation board for use as instream flows pursuant to a decreed instream flow water right held by the board for a period not to exceed one hundred twenty days,

• • •

(IV) A loan approved pursuant to this paragraph (a) shall not be exercised for more than three years in a ten-year period, for which only a single approval by the state engineer is required. The ten-year period shall begin when the state engineer approves the loan. The state engineer shall not approve a loan pursuant to this paragraph (a) for another ten-year period; except that, if the agreement has not been exercised during the term of the agreement, an applicant may reapply one time by repeating the application process pursuant to this subsection (2).

• • •

(c) All periods of time during which a loaned water right is used by the board for instream flow purposes shall be excluded from any historic consumptive use analysis of the loaned water right required under any water court proceeding.



# Useful Links

- CO Division of Water Resources [www.water.state.so.us](http://www.water.state.so.us)
- CO Foundation for Water Education [www.cfwe.org](http://www.cfwe.org)
- CO Mesa University Water Center [www.coloradomesa.edu/WaterCenter](http://www.coloradomesa.edu/WaterCenter)
- CO River Conservation District [www.crwcd.org](http://www.crwcd.org)
- CO State Water Plan [www.coloradowaterplan.com](http://www.coloradowaterplan.com)
- CO Water Congress [www.cowatercongress.org](http://www.cowatercongress.org)
- CO Water Conservation Board [www.cwcb.state.co.us](http://www.cwcb.state.co.us)